

Attorney Docket No.: J6839(C)
Serial No.: 10/730,218
Filed: December 8, 2003
Confirmation No.: 4638

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

In response to the final rejection with a notification date of October 4, 2010, please enter the following Pre-Appeal Brief Request for Review on the above-identified application as follows. A Notice of Appeal is filed herewith. Because this Request is limited to five (5) pages, the arguments here do not represent all of Applicants' objections to the office action. Applicants reserve the right to raise additional arguments on appeal, including arguments not presented in this request. The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

Remarks/Arguments begin on page 2 of this paper.

REMARKS

Reconsideration and withdrawal of the examiner's objections and rejections under 35 U.S.C. §§ 102(b) and 103(a) is respectfully requested in view of the following remarks. The applicant would like to thank the examiner for her time and kind cooperation in this matter.

35 USC § 102(b)

The examiner has maintained the rejection of claims 1, 3, 5-6, 9 and 11-13 under 35 U.S.C. 102(b) as being anticipated by Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2). Applicants respectfully traverse this rejection.

The examiner asserts that Farrell, et al., teach an effervescent cleansing composition which comprises a mixture of an acid material such as citric acid and an alkaline material such as sodium bicarbonate (abstract). Water contact causes the combination to effervesce (abstract). The alkaline material is a substance which can generate a gas such as carbon dioxide when contacted with water and the acidic material (column 2, lines 19-23). In one embodiment, Farrell, et al., teach a composition comprising potassium bicarbonate, lactic acid (satisfying claim 1a, 1b, 1d and 1f), sodium sulfosuccinate present at 11.6% by weight (satisfying claim 1e) and Optigel SH (sodium magnesium silicate) (satisfying claim 1c and e) (Table IV).

In response, applicants respectfully assert that a proper prima facie case is not set forth because Farrell, et al., and ChemBrief fail to disclose or suggest at least the following independent elements:

- 1 (b). a continuous phase present in the composition composed of a substantially anhydrous carrier;
and
- 1 (c). an organophilic particle stabilizer contained in the dispersed phase;

Farrell discloses a simple powder blend of reactive components in intimate contact in a substantially anhydrous condition which is different from the claimed continuous phase containing a dispersed phase. The skilled person would understand that a continuous phase is a liquid part of a disperse system that also contains a dispersed phase. The dispersed phase could be either a liquid or a solid (see McGraw Hill Dictionary definition of record). This is also exemplified in the examples in the instant specification (see tables 1-9 regarding the elected invention). The examiner also objects to applicant's characterization of the term "continuous phase" as a liquid citing the definition of "phase" in Hawley's Condensed Chemical Dictionary

(1971). In response, applicants respectfully reiterate that the definition of "phase" used by the examiner is overbroad as would be evident to the person of ordinary skill in the art ("POSITA") since it is not modified by the term "continuous". The complete phrase "continuous phase" would be understood by the POSITA as a liquid consistent with the McGraw-Hill Scientific Dictionary definition (of record). Applicants respectfully submit that this definition should be considered by the examiner as the broadest reasonable interpretation "In light of the specification as it would be interpreted by one of ordinary skill in the art". In re Am. Acad. of Sci. Tech. Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004). See also MPEP 2111. Furthermore, the applicants respectfully submit that prior art stabilizers such as sodium magnesium silicate or as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss.2) fail to anticipate claim limitation 1(c) because such silicate component doesn't meet the limitation of "organophilic particle" as would be evident to the POSITA. Silicate compounds are known by the POSITA to be attracted to or solvated by polar materials or solvents such as water in contrast to organophilic particles which are attracted to or solvated by nonpolar materials/solvents (see mediLexicon.com dictionary definitions of record of organophilic and organophilicity). Nonlimiting examples of inventive organophilic particles are described in the instant specification on page 20, lines 12-17 and include e.g., organophobically modified clays.

The examiner further asserts that ChemBrief teaches sodium magnesium silicate is similar to "Bentone" (Bentonite). Upon careful review of the ChemBrief article, applicants find the phrase "The chemical composition of the synthetic material (Optigel® SH Synthetic Silicate) is similar to Bentonite, Montmorillonites, etc., but Synthetic Silicate does not have heavy metals implanted in the layer lattice ... " Applicants respectfully submit the examiner errs by equating this statement regarding the similarity of such clays with the claimed "organophilic particle stabilizer" for the following reasons.

Applicants expressly teach organophilic particles may include organically modified clays and that such modified clays may be made by reacting e.g., Bentonite with fatty quaternary compounds (see instant specification page 7, lines 18-22). Therefore, even if the skilled person was lead to Bentonite from the ChemBrief reference (which applicants do not concede) there would still be no teaching or suggestion to use an organically modified Bentonite or other organically modified clay. Moreover, the POSITA understands that clays such as Bentonite are complex calcium aluminum magnesium silicate hydroxides that are naturally hydrophilic and not hydrophobic.

Applicants further respectfully submit that neither the small size of platelets nor the ability to form lamellar phase are relevant to organophilicity as the examiner asserts. As discussed above, applicants have been unable to find any reference to organophilicity in the ChemBrief reference which is required by the instant claims. The examiner also provides no reason why a POSITA would consider the silicates or similar clays described in the ChemBrief article to have organophilic character. Therefore, applicants respectfully

reiterate that the ChemBrief article fails to remedy the deficiencies of Farrell, et al., with respect to setting forth prima facie case under §§ 102(b) and 103(a) for claims 1-6, 9, 11-15, 17-20 and 23.

35 USC § 103(a)

The examiner has maintained the rejection of claims 1, 3-6, 9, 11-14 and 16 under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2). Applicants respectfully traverse this rejection.

In addition to the comments concerning the lack of a proper prima facie case under 35 U.S.C. §§ 102(b) and 103(a) above, applicants respectfully submit that Farrell, et al., teaches that the blend must be an anhydrous dry powder ostensibly to avoid any premature reaction prior to the user applying the later wetted wiping article to the skin (col. 1, lines 40-41). Farrell teaches that the desired result of the rapid effervescence created by the intimate dry blend being contacted with water is the production of "copious" lather (col. 1, lines 57-58). Applicants respectfully submit that the POSITA would not have been motivated to reduce the intimate contact of the dry powder in Farrell, et al., by suspending such powder in an inert medium (i.e., a "substantially anhydrous carrier" claimed in 1(b)).

The examiner has maintained the rejection of claim 15 under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2) as applied to claims 1, 3-6, 9, 11-14 and 16 above, and further in view of Sun, et al. (US 2004/0062735) published April 1, 2004. Applicants respectfully traverse this rejection.

The examiner asserts that Sun, et al., teach a dry article comprising an insoluble substrate, at least one oxidizing agent and at least one reducing agent, wherein the suitable oxidizing agents include alkaline metal salts and the reducing agents include sulfides and sulfites (column 4, line 40 – column 5, line 22).

Sun relates to a composition or article containing at least one oxidizing agent and at least one reducing agent, wherein at least one of the at least one reducing agent is a depilatory agent, the equivalent ratio of the at least one oxidizing agent to the at least one reducing agent is less than 1:1, and the article is exothermic when wet with water, and the use thereof to remove hair from the skin (see abstract).

Applicants respectfully submit that Sun, et al., fails to remedy the deficiencies of Farrell, et al., and ChemBrief with regards to claim 15 which depends from claim 1.

Information Disclosure Statement Previously Submitted June 20, 2005

Applicants note that a Decision on Appeal and a Decision on Request for Reconsideration recently issued in copending application serial no. 10/730,709, which was previously submitted in an IDS on June 20, 2005 and is of record in the case.

CONCLUSION

In light of the above remarks, applicants submit that the claims now pending in the present application are in condition for allowance. The examiner is invited to contact the undersigned if there are any questions concerning the case.

Respectfully submitted,

/Alan A. Bornstein/

Alan A. Bornstein
Registration No. 40,919
Attorney for Applicant(s)

AAB/ss
(201) 894-2180